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17 Attorneys for the United States

18 UNITED STATES DISTRICT COURT  
19 DISTRICT OF NEVADA

20 JOHN FRANCKI, et al.,  
21 Plaintiffs,

22 vs.


23 UNITED STATES, et al.,  
24 Defendants.

Case No. 3:06-cv-0265-LRH-VPC

25  
26 **JOINT MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENTS**

1 Plaintiffs and Defendants United States of America, Hologic, Inc. and Radiation  
2 Detection Company respectfully request that this Court determine that the releases and  
3 settlement agreements negotiated between the Plaintiffs and Defendants were made in good  
4 faith. This motion is supported by the accompanying Memorandum of Points and Authorities.

5  
6 THE VEEN FIRM

7   
8 CYNTHIA B. MCGUINN  
9 MILES B. COOPER  
10 ANTHONY L. LABEL  
Attorneys for Plaintiffs John Francki, Lance  
Hepworth, Scot Long, and Shane Nelson

11 DATED: 28 Nov 2007

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13 NIXON PEABODY

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15 HUGH KOSS  
16 PAUL STINSON

17 Attorneys for Defendant Hologic, Inc.

18 DATED: \_\_\_\_\_

19  
20 ERICKSON, THORPE & SWAINSTON,  
LTD.

21  
22 WILLIAM COBB

23 Attorneys for Defendant Radiation  
24 Detection  
25 Company

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23 Attorneys for Defendant Radiation Detection  
24 Company

25 DATED: 11.28.07

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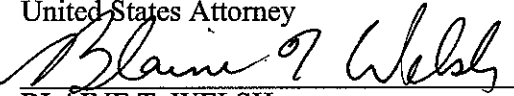
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Attorneys for the United States.

DATED: \_\_\_\_\_

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. Background

This case involves personal injury allegations by employees of a government contractor, The Boeing Company (Boeing), who were injured while using an x-ray machine to examine the structural integrity of Navy aircraft located at the Fallon Naval Air Station, Nevada. In their amended complaint, Plaintiffs named three defendants: the United States, Hologic, Inc., and Radiation Detection Company.

Generally, Plaintiffs allege that the United States was negligent because it provided Plaintiffs with a malfunctioning x-ray unit and failed to provide a safe workplace. Plaintiffs allege that Defendant Hologic, Inc., failed to properly repair the x-ray equipment and that it was improperly designed. Plaintiffs also allege that Radiation Detection Company neglected to report to Boeing high radiation exposure readings on certain radiation detection badges worn by Plaintiffs and that if it had done so, some of the over-exposure would not have occurred.<sup>1</sup>

Plaintiffs seek recovery from the United States based on claims submitted pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. §§1346(b), *et seq.* The FTCA is a limited waiver of sovereign immunity. *United States v. Idaho*, 508 U.S. 1, 6-7 (1993). Because the federal government "can be sued only to the extent that it has waived its immunity, due regard must be given to the [Act's] exceptions." *United States v. Orleans*, 425 U.S. 807, 814 (1976). The FTCA provides that the United States shall not be liable for the negligence of its contractors (28 U.S.C. §2671), *see United States v. Orleans*, 425 U.S. at 814-15; and that the United States does not waive its sovereign immunity for "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused" (28 U.S.C. §

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<sup>1</sup> The characterization of allegations in this paragraph are a summary of the principal averments and allegations made by plaintiffs. The allegations made by Plaintiffs are set forth in greater detail in Plaintiffs' First Amended Complaint.

1 2680(a), popularly known as the discretionary function exception). *See United States v.*  
2 *Gaubert*, 499 U.S. 315 (1991). If the government did not violate pertinent, self-imposed specific  
3 and mandatory obligations and its decisions were “susceptible to policy analysis,” then the  
4 exception bars the suit. *See Bibeau v. P.N.W. Research Foundation*, 339 F.3d 942, 945 (9th Cir.  
5 2003), *citing Gaubert*.

6 If those jurisdictional hurdles are overcome, the United States’ liability is determined by  
7 the substantive law of the state in which the alleged negligence occurred – in this case, Nevada.  
8 28 U.S.C. §1346(b); *Delta Savings Bank v. United States*, 265 F.3d 1017, 1025 (9th Cir. 2001),  
9 *cert. denied by Kim v. United States*, 534 U.S. 1082 (2002).

10 In Nevada, “claims for tort damages in connection with workplace injuries are only  
11 sustainable against persons or entities other than a statutory employer or persons in the same  
12 employ.” *Lipps v. Southern Nevada Paving*, 998 P.2d 1183, 1185 (Nev. 2000) (emphasis  
13 added). In Nevada, a “statutory employer” includes entities that delegate work to contractors, so  
14 long as the work being done by the contractors is work “normally” done by the delegating entity.  
15 *See Meers v. Houghton Elevator*, 701 P.2d 1006, 1007 (Nev. 1985), *quoting Bassett Furniture*  
16 *Indus., Inc. v. McReynolds*, 224 S.E. 2d 323, 326 (Va. 1976).

17 The United States believes it is unlikely that it would be found liable in this action,  
18 primarily because of the impact of Nevada’s statutory employer immunity defense.  
19 Specifically, the United States has contended in pleadings filed in this action that it cannot be  
20 liable here because the Plaintiffs were employed to perform work normally done by the Navy,  
21 thus making the Navy a “statutory employer” under Nevada law, immune from suit from  
22 employees covered by workers’ compensation arrangements.

23 Further, the United States denies that it is liable in any manner for any of Plaintiffs’  
24 alleged injuries and alleges that the radiation exposure events were caused by others, including  
25 Hologic, Inc, Radiation Detection Company and Plaintiffs themselves.  
26 . . . .

1 Hologic, Inc. denies that it is liable in any manner - whether in strict product liability,  
2 negligence, or otherwise - for any of Plaintiffs' alleged injuries and further alleges that the  
3 radiation exposure events were caused by others, including the United States, Radiation  
4 Detection Company and Plaintiffs themselves. Hologic further alleges that the United States is  
5 not immune from suit under the terms of the FTCA and Nevada's workers compensation scheme  
6 and that it would in fact have been found liable in this matter.

7 Radiation Detection Company denies that it is liable in any manner to Plaintiffs or any of  
8 them, whether in negligence, strict liability, breach of contract, or otherwise - for any of  
9 Plaintiffs' alleged injuries and damages. Radiation Detection Company further asserts that it did  
10 not "cause" any of the radiation exposure events which RDC asserts were proximately caused  
11 and contributed by third parties, Hologic, Inc., the United States government, and/or by Plaintiffs  
12 themselves. Radiation Detection Company further alleges that the United States is not immune  
13 from suit under the terms of the FTCA and/or Nevada's workers compensation scheme and that  
14 if the matter proceeded to trial the United States would have been found liable in this matter.

15 All defendants believe that some or all of the injuries Plaintiffs suffered were caused by  
16 their own actions or omissions.

## 17 **II. Argument**

18 Under NRS 17.245, when a release of claims is given in good faith to one of two or more  
19 tortfeasors, that release discharges the tortfeasor to whom it is given from all liability for  
20 contribution and for equitable indemnity to any other tortfeasor. In determining whether a  
21 release has been given in good faith, courts have looked at a number of factors, including the  
22 following:

- 23 1. The amount paid in settlement;
- 24 2. Whether there is any collusion, fraud or tortious conduct aimed at injuring the  
25 interests of the non-settling tortfeasors;
- 26 3. The allocation of settlement proceeds; etc.



1 *See The Doctors Company v. Vincent*, 98 P.3d 681, 687 (2004). These factors are not the  
2 exclusive criteria a court should use to make its determination, however. Rather the  
3 determination of whether a settlement and release are made in good faith is left to the discretion  
4 of the trial court based on all relevant factors available to the court. *Id.*

5 The facts and circumstances in this case demonstrate that the settlement between  
6 Plaintiffs and the Defendants were arrived at in good faith. Despite the Defendants' defenses and  
7 the Plaintiffs' own alleged contributions to the incidents causing their injuries, each of the  
8 Defendants has agreed to pay the Plaintiffs a sum of money. Because at least one of the  
9 settlements is confidential, the amounts paid by each Defendant are set forth in a sealed exhibit  
10 that is submitted with this Stipulation.

11 To the best of the parties knowledge, there are no non-settling tortfeasors. As a result of  
12 the mediation session before Harold Thompson and the Court-sponsored settlement conference,  
13 all of the named Defendants have reached settlement agreements with Plaintiffs. In addition, the  
14 claims of the industrial insurance carrier for Plaintiffs' employer, Boeing Aerospace, have been  
15 compromised and resolved in full by Plaintiffs and their attorneys.

16 The Plaintiffs and Defendants have not agreed how the settlement proceeds will be  
17 distributed among the Plaintiffs. Plaintiffs are represented by one law firm and have all agreed  
18 to the settlements. The Plaintiffs will decide amongst themselves and their attorneys on the  
19 proper division of the settlement proceeds.

20 In addition, the Defendants and Plaintiffs note that settling this case will save all parties a  
21 significant sum of money and considerable time. Before the settlements were reached, the  
22 United States had produced more than 50,000 pages of documents related to the statutory  
23 employer defense and had approximately 15,000 additional pages of documents to produce. The  
24 cost of reviewing, analyzing and compiling that information would be significant and would add  
25 significant additional time to the pretrial proceedings in this case. Also, the parties had  
26 contemplated several depositions of government employees at locations around the United States

1 on the statutory employer defense issues. Those depositions will no longer be necessary because  
2 of this settlement.

3 In addition, were this matter to proceed without settlement, the parties would have  
4 retained numerous expert witnesses, including medical doctors, psychologists, vocational  
5 rehabilitation specialists, engineers, and economists. The cost associated with the experts  
6 including reports, deposition and trial testimony will be saved because the parties have settled.  
7 The time and cost savings associated with the statutory employer defense and expert witnesses  
8 could easily have exceeded \$400,000.

9 Plaintiffs also represent that they believe the amounts paid in settlement by each of the  
10 Defendants are reasonable in light of the injuries allegedly sustained.

11 These facts and circumstances demonstrate that the releases and settlement agreements  
12 between the Plaintiffs and the Defendants were made in good faith.

### 13 **III. Conclusion**

14 For the foregoing reasons, Plaintiffs and Defendants respectfully request that this Court  
15 enter an order finding that the releases and settlement agreements between Plaintiffs and  
16 Defendants were made in good faith and therefore preclude any contribution or equitable  
17 indemnity claims by and between and or against any of the defendants by all tortfeasors for any  
18 incidents that are or could have been raised by Plaintiffs in this action.

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6 DATED: 28 Nov 2007

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Attorneys for the United States.

DATED: December 4, 2007

1     **ORDER DETERMINING THAT SETTLEMENTS WERE MADE IN GOOD FAITH**

2             The Court being duly informed and good cause appearing, the Court finds that the  
3 settlements, and each of them, by and between Plaintiffs and Defendants are in good faith within  
4 the terms and provisions of NRS 17.245. Accordingly, any claims for contribution and/or  
5 equitable indemnity by and between and/or against any of the Defendants by any tortfeasors are  
6 barred and precluded.

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8                             IT IS SO ORDERED:

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11                             \_\_\_\_\_  
12 LARRY R. HICKS  
13 UNITED STATES DISTRICT JUDGE

14                             DATED: December 6, 2007  
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